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No. 438

Supreme Court of the United States

WOMETCO TELEVISION AND THEATRE COMPANY,

Appellant,

—against—

THE UNITED STATES OF AMERICA and MIAMI BEACH THEATRE CORP.,

Appellees.

JURISDICTIONAL STATEMENT

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INDEX

	PAGE
Jurisdictional Statement	1
Previous Opinions	1
Grounds of Jurisdiction of the Supreme Court	1
Questions Presented by the Appeal	3
Statement of the Case	7
Substantiality of Points Raised	15

CITATIONS:

Cases:

Allen Calculators, Inc. v. National Cash Register Co., 322 U. S. 137	3
Blackhawk Hotels Co. v. Bonfoey, 227 F. 2d 232, 234	3
Brotherhood of Railroad Trainmen v. Baltimore & Ohio R. R. Co., 331 U. S. 519	3
Hughes v. U. S., 342 U. S. 353	3
In re Chicago & N. W. R. Co., 110 F. 2d 425, 427	3
Magidson v. Duggan, 212 F. 2d 748, 753, cert. denied 348 U. S. 883	3
Missouri-Kansas Pipe Line Co. v. U. S., 312 U. S. 502	3
Sanders v. Leech, 158 F. 2d 486, 487	3
Sutphin Estates Inc. v. U. S., 342 U. S. 19	3

PAGE

U. S. v. Paramount Pictures, et al., 66 F. Supp. 323 reversed in 334 U. S. 131 ..... 1, 7, 15, 17

U. S. v. Paramount Pictures, et al., 85 F. Supp. 881; aff'd sub nom.; Loew's Incorporated v. U. S., 339 U. S. 974 ..... 1, 2, 8, 15, 17

U. S. v. United States Gypsum Co., 333 U. S. 364, 395 3

Other Authorities Cited:

Federal Rules of Civil Procedure:

Rule 24(a)(2) 2, 3, 10

Rule 24(a)(3) 2, 5, 10

Rule 24(b)(2) 2, 6, 10

Rule 24(b)(3) 2, 10

Sherman Act, 15 U. S. C. Secs. 1, 2 1

Title 15, U. S. C., Sec. 29 3

Supreme Court of the United States

WOMETCO TELEVISION AND THEATRE COMPANY,

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—against—

THE UNITED STATES OF AMERICA and MIAMI BEACH THEATRE CORP.,

Appellees.

JURISDICTIONAL STATEMENT

Previous Opinions

There were no opinions delivered in the court below on either of the two orders from which this appeal is taken.

Previous opinions in this case were *U. S.* v. *Paramount Pictures, et al.*, 66 F. Supp. 323, aff'd in part, reversed in part and remanded 334 U. S. 131; *U. S.* v. *Paramount Pictures, et al.*, 85 F. Supp. 881, aff'd *sub nom.*, *Loew's Incorporated* v. *U. S.*, 339 U. S. 974.

Grounds of Jurisdiction of the Supreme Court

1. The final judgment in *U. S.* v. *Loew's Incorporated* (which is an action brought by the United States under the Sherman Act, 15 U. S. C. Secs. 1, 2), entered February 7, 1952, provided in Paragraph III 7 (b) thereof that the theatre company to be formed upon the divorcement from Loew's Incorporated of the theatres then owned by Loew's

Incorporated might petition the District Court for leave to acquire a new theatre upon showing to the satisfaction of the court and the court first finding "that the acquisition will not unduly restrain competition." Miami Beach Theatre Corp., a wholly owned subsidiary of Loew's Theatre & Realty Corporation (the New Theatre Company which was formed upon the divorcement pursuant to the terms of the judgment of February 7, 1952), petitioned the District Court pursuant to the aforesaid provision for permission to acquire a theatre in Dade County, Florida. The appellant moved for leave to intervene in the hearing, argument and determination of the said petition pursuant to Rules 24(a)(2), 24(a)(3) and 24(b)(2) of Federal Civil Procedure. The motion to intervene was denied with leave to the appellant to present argument as an *amicus curiae* and the petition of Miami Beach Theatre Corp. for leave to acquire the new theatre was granted. This appeal is taken from two orders entered in *U. S.* v. *Loew's Incorporated* 1) denying appellant's motion to intervene and 2) granting the said petition of Miami Beach Theatre Corp.

2. The order of the United States District Court for the Southern District of New York denying appellant's motion for leave to intervene was dated July 1, 1957 and was entered on July 1, 1 57 in the office of the Clerk of the United States District Court for the Southern District of New York. The order granting the petition of Miami Beach Theatre Corp. for leave to acquire and operate a theatre to be erected in Dade County, Florida, was dated July 10, 1957 and entered in the office of the Clerk of the United States District Court for the Southern District of New York on July 11, 1957. The notice of appeal from both orders was filed on July 24, 1957 in the office of the Clerk of the United States District Court for the Southern District of New York.

3. Jurisdiction to entertain these appeals is conferred on the Supreme Court by Title 15, U. S. C., Sec. 29.

4. Cases sustaining the jurisdiction of this Court to entertain the appeal from the denial of appellant's motion to intervene are:

Sutphin Estates Inc. v. *U. S.*, 342 U. S. 19;
Brotherhood of Railroad Trainmen v. *Baltimore & Ohio R. R. Co.*, 331 U. S. 519;
Allen Calculators, Inc. v. *National Cash Register Co.*, 322 U. S. 137;
Missouri-Kansas Pipe Line Co. v. *U. S.*, 312 U. S. 502.

Cases sustaining the jurisdiction of this Court to entertain the appeal from the order granting the petition of appellee Miami Beach Theatre Corp. for leave to acquire a theatre in Dade County, Florida are:

Hughes v. *U. S.*, 342 U. S. 353;
U. S. v. *United States Gypsum Co.*, 333 U. S. 364, 395;
Magidson v. *Duggan*, 212 F. 2d 748, 753, cert. denied 348 U. S. 883;
Blackhawk Hotels Co. v. *Bonfoey*, 227 F. 2d 232, 234;
Sanders v. *Leech*, 158 F. 2d 486, 487;
In re Chicago & N. W. R. Co., 110 F. 2d 425, 427.

Questions Presented by the Appeal

1. Did the District Court err in denying the motion of appellant, made pursuant to Rule 24(a)(2) of Federal Civil Procedure for leave to intervene in the hearing, argument and determination of the petition filed by appellee

Miami Beach Theatre Corp. (a wholly owned subsidiary of Loew's Theatre & Realty Corporation) to acquire a new theatre in Dade County, Florida, when the affidavit in support of said motion for permission to intervene made the following allegations:

(a) The two theatres closest to the site of the proposed acquisition and most likely to be affected thereby were operated by the appellant;

(b) In previous applications by companies subject to this and similar decrees for leave to acquire new theatres, the Government inadequately represented the interests of independent exhibitors affected thereby in that the Government had accepted the statements made by petitioners' counsel and had made no independent investigation of the facts surrounding such petitions;

(c) The appellant alleged that no independent investigation had been made by the Government in this instance also and such allegation was uncontradicted;

(d) The hearing on the application of the appellee Miami Beach Theatre Corp. was not likely to be—and in fact was not—an adversary proceeding unless permission to intervene was granted to appellant;

(e) The appellant might be bound by a finding by the District Court, which finding was in fact made, that said acquisition was not likely unduly to restrain competition if appellant attempted at a later date to invoke the jurisdiction of a Court to restrain a violation of the antitrust laws by the proposed new theatre; and

(f) No affidavit had been submitted in opposition to appellant's motion denying any of the material facts or conclusions stated in the moving affidavit.

2. Did the District Court err in denying the motion of the appellant, made pursuant to Rule 24(a)(3) of Federal Rules of Civil Procedure for leave to intervene in the hearing, argument and determination of the petition filed by appellee, Miami Beach Theatre Corp. (a wholly owned subsidiary of Loew's Theatre & Realty Corporation) to acquire a new theatre in Dade County, Florida, when the affidavit in support of said motion for permission to intervene made the following allegations:

(a) The two theatres closest to the site of the proposed acquisition and most likely to be affected thereby were operated by the appellant;

(b) In previous applications by companies subject to this and similar decrees for leave to acquire new theatres, the Government inadequately represented the interests of independent exhibitors affected thereby in that the Government had accepted the statements made by petitioners' counsel and had made no independent investigation of the facts surrounding such petitions;

(c) The appellant alleged that no independent investigation had been made by the Government in this instance also and such allegation was uncontradicted;

(d) The hearing on the application of the appellee Miami Beach Theatre Corp. was not likely to be—and in fact was not—an adversary proceeding unless permission to intervene was granted to appellant;

(e) The right of the appellant, an independent exhibitor, to operate its theatres free of an illegal conspiracy to violate the Sherman Act by Miami Beach Theatre Corp., Loew's Incorporated and other distributors was a valuable property right of appellant and would be adversely affected by the granting of the instant petition; and

(f) No affidavit had been submitted in opposition to appellant's motion denying any of the material facts or conclusions stated in the moving affidavit.

3. Did the District Court abuse its discretion in denying appellant's motion for leave to intervene under Rule 24(b)-(2) of Federal Civil Procedure under the facts set forth in "1" and "2" hereof and when the moving affidavit showed that there was a common question of fact presented by the duty cast upon petitioner Miami Beach Theatre Corp. in this proceeding to show that the proposed acquisition would not unduly restrain competition and by the burden of proof to be borne by the appellant in a contemplated action by the appellant in a private Clayton Act action to enjoin the said acquisition on the ground that it would unreasonably restrain competition under the Sherman Act?

4. Was there substantial evidence presented to the District Court to sustain the necessary finding of fact that the proposed acquisition by Miami Beach Theatre Corp. would not restrain competition when the only evidence presented to the court was the petition of Miami Beach Theatre Corp., verified by its Vice-President, which petition set forth only certain facts about the Miami Beach area, which facts had nothing to do with the distribution of motion pictures or the exhibition thereof, and the location, capacity, distance from the site of the proposed acquisition and run of certain other theatres and the conclusory allegation that the

proposed acquisition would not unduly restrain competition?

5. Was it error to grant the appellee Miami Beach Theatre Corp.'s petition for leave to acquire a new theatre in Dade County, Florida, when the right to seek this relief was contained in a judgment against Loew's Incorporated, entered on February 7, 1952, and said judgment provided as part of its overall plan to effect a complete divorcement between the film distribution and theatre exhibition interests of Loew's Incorporated that there be complete divorcement of said interests and complete divestiture by Loew's Incorporated of its interest in said theatres by February 6, 1957, and the Court having entered an order on February 4, 1957 that the requirement that Loew's Incorporated distribute the stock of Loew's Theatre & Realty Corporation owned by it be "hereby postponed until further order of this Court," so that in effect Loew's Incorporated, a producer and distributor of motion pictures, was still the ultimate beneficial owner of the stock of Miami Beach Theatre Corp. and would thereby have a substantial interest in the operation of the theatre, which said Miami Beach Theatre Corp. proposed to operate?

Statement of the Case

This appeal brings before the Court questions relating to the enforcement of a judgment entered in litigation which has been before this Court on several previous occasions and over which the District Court retained jurisdiction for several purposes including the subject matter of the petition now *sub judice*. In an opinion reported *sub nom. U. S. v. Paramount Pictures, et al.*, 334 U. S. 131, this Court approved that portion of a judgment and decree of a statutory expediting court which had found that the major dis-

tributors of motion pictures, including Loew's Incorporated, had conspired to violate the Sherman Act, but remanded the case to the District Court since the Supreme Court did not think competitive bidding for pictures alone would prevent a continuation of the practices found to be illegal. Upon remand, the District Court made additional findings of fact and conclusions of law (see Opinion, 85 F. Supp. 881) and entered a decree directing, *inter alia*, divestiture by the defendant film distributors of all their theatre interests and directing further that a plan of divorcement and divestiture be formulated and approved as to each defendant owning theatres. This decree was affirmed by the Supreme Court (see *Loew's Incorporated* v. *U. S.*, 339 U. S. 974).

Subsequent to the affirmance by the Supreme Court and on February 7, 1952 a judgment was entered against Loew's Incorporated which provided, *inter alia*, that the said defendant was to divorce itself from its theatre interests either by disposing of the said theatres to outsiders or to a New Theatre Company which was to be operated independently of Loew's Incorporated. The New Theatre Company was formed and is titled Loew's Theatre & Realty Corporation. Section V C of the February 7, 1952 judgment provided that within three years from the date of entry of said judgment, Loew's Incorporated would entirely divest itself of any ownership or interest in the stock of the New Theatre Company, which three-year period could be extended to five years from the date of the judgment.

Section III 7 (b) of the said judgment provided that after the divorcement and divestiture provisions of the judgment had been complied with, the New Theatre Company would have the right to acquire, with the court's permission, new theatres provided that it "shall show to the satisfaction of the Court, and the Court shall first find, that the acquisition

will not unduly restrain competition." A footnote to said paragraph 7 provided that, for the purposes of paragraph 7, divorcement was not to be deemed incomplete pending the completion of the divestiture procedure set forth in paragraphs C and E of Section V.

On February 4, 1957 the District Court entered an order postponing the dates provided for the "division or refinancing or stock distribution" of the New Theatre Company's interest from Loew's Incorporated "until further order of this Court."

Pursuant to the provisions of the judgment against Loew's Incorporated, Loew's Theatre & Realty Corporation has several times petitioned the District Court for leave to acquire new theatres. All of these petitions have been granted upon the recommendation of the Government. The instant petition, however, was the first one to come before the court since the indefinite postponement of the date upon which Loew's Incorporated is to divest itself of the stock of Loew's Theatre & Realty Corporation.

Miami Beach Theatre Corp.'s petition for an order permitting it to acquire a conventional theatre to be erected on Collins Avenue between 169th and 170th Streets, Sunny Isles area, Dade County, Florida, recites that the site of the proposed new theatre is about ten miles north of downtown Miami Beach and seven miles south of downtown Hollywood, Florida in an area occupied by many motels and known as "Motel Row," and it further alleges that neither petitioner nor any affiliate has any interest in any other theatre in Florida except the Riviera Theatre in South Miami and the Normandy Drive-In Theatre on the outskirts of Jacksonville. The petition then lists the theatres "closest to the proposed acquisition" giving the location, distance from the site of the proposed theatre, capacity, operator and availability date. (The availability

date of a motion picture theatre is the date on which it may play pictures pursuant to run and clearance provisions imposed against it in film license agreements.)

The petition further sets forth the names and locations of the first-run theatres in downtown Miami Beach. Except for the conclusory allegation that the proposed acquisition "will not unduly restrain competition," the petition states no other fact from which the court could or could not determine as a fact whether or not the proposed acquisition would unduly restrain competition.

The petition showed that the theatre nearest the site of the proposed new theatre was the Boulevard Drive-In Theatre which is operated by the appellant Wometco and is located three and three-tenths miles from the site of the proposed acquisition. The nearest conventional theatres are the Surf Theatre operated by the appellant Wometco, and the Normandy Theatre operated by the Claughton Circuit, another independent exhibitor, both theatres being five miles from the site of the proposed acquisition.

The appellant filed a notice of motion seeking permission to intervene in the hearing, argument and determination of the aforesaid petition of Miami Beach Theatre Corp. pursuant to the provisions of Rules 24(a)(2), 24(a)(3) and 24(b)(2) of Federal Civil Procedure. The affidavit submitted in support of this motion recited the interest of the appellant in the Boulevard and Surf Theatres and many facts to show that the hearing on the petition, if intervention were to be denied, would not be an adversary proceeding. The moving affidavit cited instances to show that in other hearings of this sort, held pursuant to the same provisions of the February 7, 1952 judgment against Loew's Incorporated, the Department of Justice "has been content to determine its stand from the petitions of the defendants herein and conversations with the defendants' attorneys

and perhaps a consideration of maps which did not begin to reveal the whole story." The reference to "defendants" was to Loew's Incorporated and its co-defendants in the main suit. The affidavit alleged that the Government had not taken steps to provide itself with the knowledge to protect the interest of either the public or independent exhibitors who would be affected by the subject matter of the petition.

The affidavit further stated that granting appellant Wometco the status of an *amicus curiae* would not be an adequate substitute for intervention, because the power of subpoena was not available to an *amicus curiae*. Wometco planned to use the power of subpoena to obtain from Loew's Incorporated and Loew's Theatre & Realty Corp. evidence which would prove that the Riviera Theatre, a theatre in South Miami operated by Loew's Theatre & Realty Corp. pursuant to permission granted in a proceeding similar to the instant one, had been restraining competition because of an illegal conspiracy between Loew's Incorporated and Loew's Theater & Realty Corp. Wometco also planned to employ subpoenas in order to determine what conversations there had been between Loew's Theatre & Realty Corp. and distributors, including Loew's Incorporated, as to the run which would be granted the proposed new theatre. The granting of the right to be heard as an *amicus curiae* was also an insufficient substitute for intervention, because the right to appeal was not available to an *amicus curiae* and an *amicus curiae* did not have the right to examine and cross-examine witnesses and adduce evidence—rights possessed by an intervenor.

The Government submitted no affidavit in opposition to appellant's motion and at no time during these proceedings either by affidavit, statement of counsel, or otherwise, did the Government indicate that it had made any inde-

pendent investigation as to whether or not the proposed acquisition would unduly restrain competition or that it had any information or knowledge on which it based its recommendation to the District Court that the petition of appellee Miami Beach Theatre Corp. be granted, except such information and facts as it received from petitioner's counsel.

At the commencement of the hearing on the petition of appellee Miami Beach Theatre Corp., the court denied the appellant's motion for intervention but permitted the appellant to be heard on the argument as an *amicus curiae*. Other than two maps, which were marked in evidence and which did nothing but visually portray the geographical position of the theatres as set forth in the petition, there was no evidence of any sort presented to the District Judge, excepting, of course, the verified petition itself.

The District Judge heard arguments of counsel. Counsel for the appellee Miami Beach Theatre Corp. in effect merely restated that which was contained in the petition. Counsel for the Government also restated that which was in the petition and added the information that "Loew's Theatres has indicated they will try to get as early a run as possible. It also indicated to the Government that, if possible, they will endeavor to get a first run for this theatre, and, if possible, a first run which may play day and date with the downtown first-run theatres for the first-run theatres in the Lincoln Road and Washington Avenue areas of Miami Beach." Counsel for the Government did not advise the court for what reason Loew's new theatre might be able to get a run which no other neighborhood theatre in Miami Beach had been able to get theretofore or what provisions would be made to insure that other theatres, competitive with Loew's new theatre would have an opportunity for the same run although it (a first run) had been theretofore denied them or what effect, if any, Loew's new theatre re-

ceiving a first run would have on restraining competition. Excepting for stating that it had learned from Loew's that the new theatre would seek a first run, the Government's argument added nothing to the contents of the petition or indicated that any investigation had been made of the subject matter thereof. The Government's counsel advised the court that "it is the view of the Government that the acquisition of this theatre by Loew's Theatres will not unduly restrain competition."

Counsel for the appellant Wometco argued to the court that in the Greater Miami area a picture had three first-run exhibitions, all of which were more or less simultaneous. Pictures played on a first run simultaneously (1) in a theatre in Miami in the downtown Flagler Street area, (2) in Miami Beach in the downtown Lincoln Road area, and (3) in Coral Gables in the downtown Miracle Mile area. Each of these areas is a principal downtown shopping area.

Until Loew's Riviera Theatre opened in South Miami (on the border of Coral Gables) in 1956, no theatre in the entire Greater Miami area, other than those located in these three downtown shopping areas, has ever been given the right either to negotiate or to bid for first-run pictures. Loew's Riviera Theatre, when it opened in a neighborhood and not in a downtown shopping area, received this right to bid against theatres in downtown Coral Gables, which right had hitherto been denied to every other neighborhood theatre in the Greater Miami area. Loew's Riviera Theatre was bidding for first-run pictures and figures were read to the court to show that Loew's Theatres was winning bids for its Riviera Theatre by making bids not warranted by the gross receipts of the theatre but by using its "long purse" in the manner which the Supreme Court in its first opinion herein foresaw and condemned as being a restraint

on competition (334 U. S. 131, 164). It was shown to the court that Loew's Riviera Theatre, a neighborhood theatre, for the period after it opened on February 16, 1956 to April 18, 1957, had been permitted to play 33⅓ of the pictures distributed by Loew's Incorporated on a first run, a much higher percentage than prevailed in the pictures distributed by any other distributor.

No theatre, other than those in the downtown Lincoln Road area in Miami Beach, has been granted the right by any distributor to negotiate for or bid for pictures on a first run in Miami Beach. It was suggested to the court by appellant's counsel that, in order to forestall granting to the new Loew theatre a privilege heretofore denied all other neighborhood theatres in the area in question and which might be denied to them in the future and to prevent a repetition of the Riviera situation, if the petition for leave to take the new theatre be granted, it be granted upon the condition that the said theatre be afforded an availability no better than that presently afforded competitive theatres in the vicinity and that the said availability could not be bettered without further leave of the court. This would give the court a later opportunity to pass on the justification for disturbing the existing pattern of distribution in favor of Loew's new theatre and ascertaining whether or not such a change was justified or was a conspiratorial effort to aid and to restrain competition in favor of Loew's new theatre.

Counsel for the appellant also argued that, since the divestiture by Loew's Incorporated of its stock in Loew's Theatre & Realty Corp. was indefinitely postponed and Loew's Incorporated would thereby have an ultimate beneficial interest in this new theatre until such divestiture, the letter and spirit of the previous judgments in this case would be best served by denying the petition without preju-

dice to a renewal thereof after the divestiture had been completed.

Substantiality of Points Raised

1. The questions raised by the denial of the appellant's motion for leave to intervene, both as of right and permissively, present matters of policy and practice which should be adjudicated by this Court. The judgments against the various defendants in *U. S. v. Paramount* who had theatre affiliates all contain provisions permitting these divorced affiliates to petition the District Court for leave to acquire new theatres and require that as a prerequisite to the granting of this petition, the said affiliate show to the court and the court find as a fact that the proposed acquisition will not unduly restrain competition. Applications pursuant to these provisions are not infrequent and are now following the same pattern as was followed in the proceedings now before the Court. The general pattern is for the petitioner to file a verified petition showing only a listing of its own theatres in the general vicinity of the proposed acquisition and the theatres of others and the conclusory allegation that the said acquisition will not unduly restrain competition. At the hearings no evidence, other than the verified petition and one or more maps visualizing the contents of the petition are presented to the court. The Government, relying on facts submitted to it by petitioner's counsel and giving no indication that it has made any independent investigation, corroborates the facts about physical locations and number of theatres, and, as in the instant case, gives the court no analysis either by way of evidence or argument as to the probable or possible effect the proposed acquisition will have on restraining competition. In so far as the petitioner and the Government are concerned, the proceeding is completely non-adversary.

It is submitted that this Court should rule on whether or not in the relaxing of a decree entered in an antitrust action brought by the Government, a private party, who will be indisputably affected by the relaxation of the decree, should be permitted to intervene, especially when it has been proven that the practice of the Government is neither to investigate nor to oppose the defendants' petitions. Unless such a policy is declared by this Court for the guidance of the District Courts, the effect of decrees entered against defendants in a Sherman Act case will be considerably diluted. This instant matter is not one where a private party seeks to intervene either to upset, change or to help formulate a decree affecting an entire industry or a large segment of an industry. It is a matter wherein a private party having a substantial financial interest which will be affected by the disposition of a petition affecting only this one situation seeks to intervene only on this one issue, and then in an instance when it is shown that the Government, the supposed vindicator of the public, is not adequately protecting the interests of either the public or of said private party. It is also a matter of urgent public policy for the Supreme Court to declare that when intervention should be allowed, granting the status of an *amicus curiae* is an insufficient substitute, because an *amicus curiae* does not have the right to present its own evidence or to examine the petitioner on its evidence.

2. The granting of the petition of the appellee Miami Beach Theatre Corp. without any substantial evidence to sustain the necessary finding of fact that the proposed acquisition will not unduly restrain competition merits plenary consideration by the Supreme Court. As has heretofore been shown, the practice has arisen of granting petitions of this sort and making the necessary finding of fact on the submission of a more or less formal petition and

no other evidence, except the maps visualizing formal allegations of the petition. If the integrity of the judgments in *U. S.* v. *Paramount*, which judgments have occupied so much of the time of the District Court and of the Supreme Court, are to be preserved, the Supreme Court will have to instruct the District Court on the minimum amount of evidence which the District Court must receive in order to make the necessary finding of fact that competition will not be restrained by a proposed acquisition. Location and ownership of theatres are insufficient facts on which to base such a finding. Runs, clearances, methods of licensing, the past history of licensing existing theatres in the area, any proposed changes in the pattern of distribution, the reasons for said changes and the effects thereof on other theatres in the area are all facts which must be considered and which should be fully explored by the District Court in passing upon the likelihood of competition being unduly restrained.

3. The Supreme Court, in its consideration of the first judgment herein (334 U. S. 131), remanded the cause for a reconsideration of the effect of vertical integration in the motion picture industry, in order to determine whether or not competition could be restored in the industry without complete divorcement of distribution and exhibition. Ultimately, this Court affirmed a judgment of the District Court (339 U. S. 974), which ordered such divestiture and divorcement as the only way of curing the monopolistic practices of the defendants. In the instant matter, Loew's Incorporated is no longer facing a deadline as to when it must divest itself of its theatre interests. Appellant is not seeking to question the order which so extended the time of Loew's Incorporated for divestiture. However, as long as said order of indefinite postponement is in effect, any new theatre acquired by Loew's Theatre & Realty Corporation or one of its subsidiaries, such as Miami Beach

Theatre Corp., is a strengthening of the position of Loew's Incorporated, the owner of all the stock of Loew's Theatre & Realty Corporation, in theatre exhibition and a continuation of the vertical integration this Court condemned and ordered extirpated. The vindication of the prior two rulings of the Supreme Court concerning divorcement of exhibition from distribution requires a review here of the order granting the petition of Miami Beach Theatre Corp.

Respectfully submitted,

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IN THE

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WOMETCO TELEVISION AND THEATRE COMPANY,

Appellant,

—v.—

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MIAMI BEACH THEATRE CORP.,

Appellees.

APPELLANT'S BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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INDEX

PAGE

Statement 1

ARGUMENT

POINT I

The Supreme Court has jurisdiction to entertain the appeal from the order denying intervention and the said appeal presents a question sufficiently important and substantial to require further argument 2

Cases Cited in Appellees' Briefs Are Not Controlling on This Case 6

Granting Intervention Would Not Have Delayed Proceedings 9

The Motion for Intervention Complied With the Rules 10

This Appeal Presents an Important Question 11

POINT II

The appeal from the order granting Miami Beach Theatre Corp.'s petition for leave to acquire a new theatre should be considered by the Supreme Court 13

The Record Lacks Substantial Evidence to Support the District Court's Findings of Fact 13

Petitioner Intends to Operate the Proposed New Theatre on a First Run 15

Suggested Terms for Granting Petitioner Leave to Acquire the Proposed Theatre 17

PAGE

Loew's Incorporated Would Be the Ultimate Beneficial Owner of the Proposed New Theatre for an Indefinite Period 17

Conclusion 20

AUTHORITIES CITED:

Cases:

Allen Calculators, Inc. v. National Cash Register Co., 322 U. S. 137 ..... 3, 6, 7

Ball, Trustee v. United States, 338 U. S. 802 ..... 3, 9

Partmar Corp. v. United States, 338 U. S. 804 ..... 3, 9

St. Louis Amusement Co. v. United States, 326 U. S. 680 ..... 3, 9

Sutphen Estates, Inc. v. United States, 342 U. S. 19 .... 3, 7

United States v. Paramount Pictures, Inc., 334 U. S. 131 ..... 3, 8, 10, 11, 14

U. S. v. Paramount, 85 F. Supp. 881, aff'd sub nom. Loew's Incorporated v. U. S., 339 U. S. 974 ..... 7, 9, 10, 11, 12, 17, 19, 20

Other Authorities:

Supreme Court Rules, Rule 16, Subsection 3 2

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

Statement

There is now before the Court the appellant's appeal from two orders entered in the United States District Court for the Southern District of New York which respectively (1) denied appellant's motion for leave to intervene in the hearing, argument and determination of a petition filed by Miami Beach Theatre Corp. (a wholly owned subsidiary of Loew's Theatre & Realty Corporation) for leave to acquire a new theatre to be erected in Dade County, Florida, and (2) granted the aforesaid petition, which petition was made in *U. S.* v. *Loew's Incorporated* and pursuant to a judgment entered therein on February 7, 1952. The statement of the

case which is found on pages 7 to 15 of the Jurisdictional Statement is neither amended nor questioned by either of the appellees' briefs filed in support of their respective motions to dismiss or affirm these appeals, and hence it can be assumed the said statement fairly states the case. For this reason it will be incorporated herein by reference and not repeated.

This brief, submitted pursuant to the provisions of Rule 16, Subsection 3, of the Supreme Court Rules will advert only to points raised in the appellees' briefs, and other matters contained in the Jurisdictional Statement will not be restated or repeated in this brief.

ARGUMENT

POINT I

The Supreme Court has jurisdiction to entertain the appeal from the order denying intervention and the said appeal presents a question sufficiently important and substantial to require further argument.

The parties are in accord that the Supreme Court may entertain an appeal denying intervention when (a) intervention as of right under the Federal Rules is denied, or (b) there was an abuse of discretion in denying permissive intervention when the same is allowed under the Federal Rules. The basic contention of the appellant on this point is that the Trial Court abused its discretion in failing to permit the appellant to intervene when the uncontroverted affidavit submitted in support of the motion for leave to intervene showed (1) that the appellant had a substantial financial interest at stake in the subject matter of the petition filed by Miami Beach Theatre Corp., (2) that an action which appellant proposed to institute and

the subject matter of the aforesaid petition of the appellee Miami Beach Theatre Corp. had questions of law and fact in common, (3) that the Government had made no investigation of the facts pertinent and material to the petition filed by Miami Beach Theatre Corp. other than to accept those facts submitted to it by the appellee Miami Beach Theatre Corp., (4) that the Government was both unprepared and unwilling to protect the interests of the public and of the appellant at the hearing of the petition (and in fact did not do so), and (5) that unless the motion for leave to intervene was granted, the hearing on the petition of Miami Beach Theatre Corp. would to all intents and purposes be a non-adversary proceeding.

Appellees have cited cases* in which this Court has either refused jurisdiction on appeals from or has affirmed orders of a District Court where intervention by a private party had been denied in an antitrust suit brought by the Government. However, in each and every one of these cases; the Government had actively participated in the case or the hearing and the proceeding had been adversary throughout. It is believed—and the appellees' briefs cite no case to the contrary—that the Supreme Court has never had presented to it an appeal from a denial of intervention in a phase of an antitrust suit, to which the Government is a party, where, as here, (a) the affidavit in support of the motion to intervene alleges that, and cites evidence to the fact that, the Government on previous applications of similar nature did not investigate the facts surrounding the petition other than to accept those presented to it by counsel for the petitioner (which is a former affiliated

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* *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137; *Ball, Trustee* v. *United States*, 338 U. S. 802; *Partmar Corp.* v. *United States*, 338 U. S. 804; *St. Louis Amusement Co.* v. *United States*, 326 U. S. 680; *Sutphen Estates, Inc.* v. *United States*, 342 U. S. 19; *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131.

theatre circuit found guilty of violating the antitrust laws) and that the government has not made any independent investigation which would enable it to form a judgment as to whether or not the proposed new theatre would unduly restrain competition and to oppose the petition if it decided the said question in the affirmative; (b) that on the instant petition the Government had made no such investigation and was not prepared to oppose the petition and, in fact, was going to recommend to the District Judge that it be granted only on the basis of facts submitted to it by counsel for Miami Beach Theatre Corp.; (c) that no affidavit denying these allegations contained in the affidavit in support of the motion to intervene was submitted and, in fact, at the hearing the Government recommended and strenuously advocated the granting of the petition, but cited no facts to justify its stand other than facts admittedly conveyed to it by the petitioner Miami Beach Theatre Corp.;* (d) that except for arguments permitted to be made by independent exhibitors' counsel as *amici curiae*, the hearing on the petition was, in fact, a non-adversary proceeding throughout; (e) the motion for intervention was made by a party whose existing interests would certainly be affected if the petition on which intervention was sought were granted; and (f) intervention was sought solely on the one phase of the case affecting the appellant's interests and would not affect the basic judgment.

The following facts have been established and should be considered in weighing the applicability of cases cited by the appellees in support of their motions:

1. Although at all stages of these proceedings—in the affidavit in support of the motion to intervene, in the

* See Record on Appeal, Transcript of Stenographer's Minutes of hearings on June 27-28, 1957, pp. 8-12.

argument made by appellant's counsel before the District Court, and in the Jurisdictional Statement filed herein—the appellant alleged that the Government had accepted the statements made to it by counsel for Miami Beach Realty Corp. and had made no independent investigation of the facts, and hence was in no position either to determine whether to support the granting of the petition or to oppose the same, the Government has never, either by affidavit, argument of counsel in the District Court, statement in the brief filed herein with the motion to dismiss, or otherwise, stated or alleged that, except for receiving statements from the petitioner's attorneys, it made any investigation or learned any facts which would enable it to determine whether or not the acquisition by the petitioner of a new theatre in Dade County, Florida, would unduly restrain competition.

2. The proceedings below were non-adversary.

3. Intervention was sought by appellant only as to the limited question whether or not the acquisition of the new theatre by the petitioner would unduly restrain competition and as to no other phase of *U. S.* v. *Loew's Incorporated.*

4. Since the two theatres closest to the proposed new theatre of Miami Beach Theatre Corp. were operated by appellant, appellant had vital interests at stake in these proceedings and was in a position to adduce evidence not otherwise presented which would assist the District Court in determining whether or not the acquisition of this new theatre would unduly restrain competition.

Cases Cited in Appellees' Briefs Are Not Controlling on This Case

The principal case relied on by the Government in its brief supporting its motion to dismiss the appeal or affirm is *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137, cited and discussed at pages 5 to 7 of the Government's brief. The reasons advanced by the Supreme Court for affirming the order denying intervention in *Allen* constitute the strongest argument appellant could advance in support of its position here.

1. At page 139 the Supreme Court wrote:

> "The issues, which were tried upon evidence submitted by National and by the Government . . . The proceeding was adversary throughout."

This situation is in sharp contrast to the instant case where there was no evidence submitted other than a very sketchy affidavit by the petitioner and the proceeding was non-adversary throughout.

2. At page 142 the Court wrote:

> "The record here discloses that the parties produced all data they and the court thought was available upon the issues in the case. Moreover, the court invited the Government to call the appellant's president to testify as to his knowledge concerning the issues."

This is in sharp contrast to the instant proceedings where no data was submitted outside of the location and ownership of certain theatres, as set forth in the affidavit submitted in support of the petition, and the appellant was not permitted to introduce any evidence nor were any of appellant's witnesses called to testify by other parties.

3. Also at page 142 the Court wrote:

> "Where, as here, examination of the entire record leading to the court's final order discloses that the issues were thoroughly explored and that the parties were adequately represented, the action of the court denying intervention should not be reviewed."

Contrast this situation with the instant proceedings where an examination of the entire record discloses that there was no evidence taken before the District Court and that the Government adequately and effectively represented the petitioner Miami Beach Theatre Corp., but represented no one else.

Despite the Government's active participation as an adversary to the petitioner in *Allen*, three Justices of the Supreme Court dissented and voted to reverse the order denying intervention.

Both of the appellees' briefs cite *Sutphen Estates, Inc.* v. *United States*, 342 U. S. 19. *Sutphen* vividly illustrates another distinction between the instant case and previous cases decided by this Court and cited in appellees' briefs. One of the chief items, if not the chief item, of relief granted the Government in *U. S.* v. *Paramount* (85 F. Supp. 881, aff'd sub nom. *Loew's Incorporated* v. *U. S.*, 339 U. S. 974) was the divorcement of theatre exhibition from motion picture distribution. In *Sutphen* the would-be intervenor sought intervention in the main case on the major issue of the divorcement of Warner Bros. theatres from the parent company to protect a guarantee of the present Warner Bros. Pictures, Inc. on a lease of theatre property owned by appellant and under lease "to a subsidiary of a subsidiary of Warner" (342 U. S. 19, 21). The Supreme Court (Mr. Justice Black dissenting) dismissed the appeal from the order denying intervention on the grounds (1) that the

claim of injury is "too speculative and too contingent on unknown factors"; and (2) "to prevent the administration of the decree from being burdened with a collateral issue that on this record can properly be adjudicated elsewhere" (342 U. S. 19, 23). In the instant case there was nothing speculative or contingent in the appellant's claim. The judgment in *U. S.* v. *Loew's Incorporated* specifically ordered the District Court to inquire and find as a fact that the acquisition of a new theatre by a former affiliated circuit would not "unduly restrain competition" before granting a petition for leave to take such new theatre. Certainly the operator of the two theatres closest to the site of the proposed new theatre could not be said to have a speculative claim on the issue as to whether or not competition would be unduly restrained. If any competition would be unduly restrained by the proposed new Loew Theatre, it would be that of the appellant's Boulevard Drive-In Theatre and Surf Theatre. Nor is appellant raising a collateral issue. The sole issue on the hearing below was as to whether or not competition would be unduly restrained by a subsidiary of Loew's taking this new theatre. This was the issue and the only issue upon which appellant sought to intervene.

The brief of the appellee Miami Beach Theatre Corp. at page 6 cites in support of its contention *U. S.* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 177. This was the opinion of the Supreme Court remanding to the Statutory Court its original decree. In this opinion the Supreme Court did not disturb the ruling of the Statutory Court denying intervention to certain independent exhibitors and associations of exhibitors. The Supreme Court did "not consider the merits" of the argument advanced by the would-be intervenors because intervention had been sought on the issue of mandatory competitive bidding and mandatory competitive bidding was eliminated from the decree by the action of the Supreme Court. It is also interesting to note

that the position of the Government paralleled that of the would-be intervenors in *Paramount* and the Government prosecuted an appeal from that portion of the decree which made competitive bidding mandatory.

Three other cases cited on page 6 of the appellee Miami Beach Theatre Corp.'s brief, viz., *St. Louis Amusement Co.* v. *United States*, 326 U. S. 680; *Ball, Trustee* v. *United States*, 338 U. S. 802; *Partmar Corp.* v. *United States*, 338 U. S. 804, are not at all applicable to the case at bar. In all these cases, the intervention was sought to influence the basic decree in the case on issues which the Government was actively litigating. In none of these cases was the petition of a former defendant to acquire a new theatre the issue and the Government's brief (p. 9) is, therefore, incorrect in stating that this Court denied "intervention under circumstances precisely like those here." These *per curiam* decisions are in no way precedents governing or even applicable to the instant appeal. In the case *sub judice* intervention was sought on a single issue which vitally affected appellant. Here appellant is not seeking to affect or modify the basic judgments in the case and the Government had not assumed an adversary position paralleling appellant's.

Granting Intervention Would Not Have Delayed Proceedings

The Government's brief (page 8) argues that intervention should have been denied because there might result "delay and prejudice" to the rights of the parties to the main action. This charge is not borne out by the record. On page 6 of the affidavit of Mitchell Wolfson submitted in support of the motion of the appellant to intervene, it is unequivocally stated that "Wometco is ready, willing and able to go forward with the hearing on the return date set forth in the petition of Miami Beach Realty Corp. and

there will be no delay in these proceedings if this motion to intervene is granted." On June 27, 1957, the return date of Miami Beach Theatre Corp.'s petition, the appellant had a witness and other evidence in court and was prepared to go on with the hearing if permitted to do so.

The Motion for Intervention Complied With the Rules

The Miami Beach Theatre Corp.'s brief, at page 9, argues that the appellant should be denied the right to intervene because "it was the public, not a private, interest that the decree sought to protect." This statement is not borne out by either the pleadings or the opinions in this case. From the very inception of *U. S.* v. *Paramount*, the Government sought and the courts granted relief designed to aid both the public and independent exhibitors who had been victimized by the defendants, including Loew's Incorporated. The case was initiated by a petition filed by the Government in 1938. Paragraph 149 of this petition alleged abuses as a result of which an "independent exhibitor is deprived of access to a free, open and untrammeled market." Paragraph 214 of the petition, one of the key paragraphs thereof, is headed: "Trade Practices Imposed Upon Independent Exhibitors." The Supreme Court's opinion in *U. S.* v. *Paramount*, 334 U. S. 131, 172-175, shows that one of the chief concerns of the Court in remanding the case for further hearings on the effect of the vertical integration of some of the defendants was the exclusion of independent exhibitors from the opportunities offered by first-run exhibition.

The argument is advanced in Miami Beach Theatre Corp.'s brief that the denial of intervention was justified because the motion for intervention was not "accompanied by a pleading setting forth the claim or defense for which intervention is sought." Page 5 of the affidavit of Mitchell

Wolfson submitted in support of the motion to intervene specifically adverts to the right of the appellant "to enjoin petitioner (Miami Beach Realty Corp.) from acquiring this theatre if it appeared that such acquisition would unreasonably restrain competition." This statement gives complete and adequate notice not of a vague contemplated suit, but of the specific claim for the protection of which intervention was sought. Requiring a formal pleading to be filed in addition to this statement would be an exaltation of form over substance which is completely foreign to the spirit of the Federal Rules and the adjudications thereunder.

This Appeal Presents an Important Question

The importance of the appeal from the order denying intervention herein transcends the instant case. The first decree entered in *Paramount* was remanded by the Supreme Court (334 U. S. 131) for the further consideration by the Statutory Court of the necessity of divorcing theatre exhibition from motion picture distribution, in order to restore competition to the motion picture industry. Upon consideration on the remand, the Statutory Court ordered divorcement and made a particular point of requiring that the decree enjoin "any theatre-holding corporation resulting from the divorcement * * * from acquiring a beneficial interest in any additional theatre unless the acquiring exhibitor-defendant or corporation shall show to the satisfaction of the court, and the court shall first find, that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures." (*United States* v. *Paramount Pictures, et al.*, 85 F. Supp. 881, 899.) The decree entered after this opinion was affirmed by the Supreme Court, sub nom. *Loew's Incorporated* v. *United States*, 339 U. S. 974. It is clear that the Supreme Court

and the Statutory Court did not intend that the hearing on whether or not a proposed acquisition of a new theatre by a former affiliate would unduly restrain competition should be a *pro forma* non-adversary proceeding. Although we are not suggesting that the spirit and letter of the decree in *Paramount* require the Government to oppose an application for leave to acquire a new theatre when there is no good ground for opposition, it is strongly urged that the preservation of the integrity of the decrees in *Paramount* require either that the Government oppose said application or, if it does not oppose or recommends the granting thereof, that it state to the Court the extent of the investigation made by the Government and the results thereof. If this Court does not consider the appeal from the order denying intervention it will, in effect, be sanctioning what has become the prevalent practice in considering petitions for leave to acquire new theatres by former affiliated theatre circuits and one of the prime safeguards which have been put around a revival of the pernicious practices which the decree in *Paramount* sought to terminate will have been seriously undermined. To insure the enforcement of decrees resulting from its own previous opinions herein, it is necessary for the Supreme Court to consider this appeal.

POINT II

The appeal from the order granting Miami Beach Theatre Corp.'s petition for leave to acquire a new theatre should be considered by the Supreme Court.

The proceeding in which there was entered the second order herein appealed from was held pursuant to Paragraph III 7 (b) of the judgment entered against Loew's Incorporated on February 7, 1952, which judgment is included in the Record on Appeal. In this proceeding the District Judge had presented to him one narrow point and that is whether or not the acquisition of the proposed new theatre by Miami Beach Theatre Corp. would or would not "unduly restrain competition." However, in order to grant the petition, the District Judge under the aforesaid consent judgment had to first find as a fact that the proposed acquisition would not unduly restrain competition. Thus, the burden of proof was thrown on petitioner Miami Beach Theatre Corp.

The Record Lacks Substantial Evidence to Support the District Court's Findings of Fact

The only evidence submitted to the court below was the petition of Miami Beach Theatre Corp. setting forth certain physical facts about the Miami Beach area and, in so far as the motion picture industry was concerned, only the location, capacity, distance from the site of the proposed acquisition, and run of certain other theatres and the conclusory allegation that the proposed acquisition would not unduly restrain competition. At the hearing this petition was supplemented by two maps which showed the locations of the various theatres mentioned in the petition and by no other evidence whatsoever.

In this meagre record there was no substantial evidence on which to base the required finding of the District Court that the proposed acquisition would not unduly restrain competition. At the argument before the District Court, counsel for both appellees stressed the fact that Loew's Theatre & Realty Corporation (the 100 per cent corporate parent of Miami Beach Theatre Corp.) had only two other theatres in Florida, one in Jacksonville and one in Coral Gables, and that the absence of any appreciable numerical strength in the area would effectively preclude Loew's Theatre & Realty Corporation from unduly restraining competition in operating the proposed new theatre. Thus, the question on this appeal narrows down to the point of whether or not evidence of only the fact of the small numerical strength of Loew's Theatre & Realty Corporation's holdings in the area, without evidence as to how these few theatres had been operated or how the proposed new theatre would or could be operated by Loew's, was substantial enough evidence on which to base the finding that competition would not be unduly restrained.

One theatre, if given an opportunity to acquire a first run of pictures in any given area by means not available to its competitors, can illegally, effectively and unduly restrain competition in exhibition in that area. This was recognized by the Supreme Court. "The main contest is over the cream of the exhibition business—that of the first-run theatres." (*U. S. v. Paramount Pictures*, 334 U. S. 131, 166.)

The Supreme Court also said at page 167:

> "The central problem presented by these cases is which exhibitors get the highly profitable first-run business. That problem has important aspect under the Sherman Act."

Petitioner Intends to Operate the Proposed New Theatre on a First Run

Although no evidence was presented to the Court as to the run on which Loew's Theatre & Realty Corporation would attempt to operate the proposed new theatre, counsel for the Government stated to the District Judge that it had been advised by the petitioner that it would attempt to operate the same on a first-run.

Counsel for the appellant, arguing by the court's permission as *amicus curiae*, stated certain facts to the court which made all the more pressing an inquiry into how and why the new Loew suburban theatre proposed to obtain a first run previously denied all other suburban theatres in Miami Beach by the distributors—Loew's erstwhile co-defending conspirators. Prior to 1956 the first runs in the Greater Miami area had been exhibited simultaneously (or day and date as it is known in the trade) in three separate centers: (1) the Flagler Street shopping area in Miami, (2) the Lincoln Road shopping area in Miami Beach, and (3) the Miracle Mile shopping area in Coral Gables. Each of these three areas constituted the most important downtown shopping center in its district. In each of these three areas, first-run pictures were licensed on a competitive bidding basis and there was intense competition for first-run pictures in each of these areas. Prior to 1956 not a single one of the many conventional indoor theatres and drive-in theatres located in Miami—Miami Beach—Coral Gables, except those in the downtown shopping areas (*supra*), was permitted by the distributors to exhibit a first-run picture or even to bid for the privilege. The distributors all took the position that the proper distribution of their pictures required a first run in the downtown shopping areas only and subsequent-run exhibitions in other outlying theatres thereafter. However, in 1956 a subsidiary of Loew's Theatre & Realty Corporation, by permission of the District

Court granted pursuant to Section III 7 (b) of the judgment against Loew's Incorporated, opened its Riviera Theatre on the border of South Miami and Coral Gables and was given the right by several distributors, led by Loew's Incorporated, to bid for first-run pictures. No explanation was given to the court either in the form of affidavit or argument as to why Loew's Riviera Theatre was given an opportunity to bid for first-run pictures when such privilege had been theretofore denied to every other theatre in the entire vicinity not located in one of the three downtown centers.

With the experience of Loew's Riviera Theatre in mind, it is easy to see that the lack of numerical strength of Loew's in the area does not inhibit its potential for unduly restraining competition. All the theatres located in the general vicinity of the site of the proposed new theatre have been served pictures by all distributors including Loew's Incorporated on a subsequent-run basis, that is, a run following the downtown Lincoln Road first run. If the new Loew theatre in the midst of all these theatres is granted the privilege of bidding or otherwise negotiating for first-run pictures, which privilege had been theretofore denied to other theatres in the vicinity and might in the future be denied them if precedent were any prediction of the future course of the distributors, then indeed the petitioner with its one theatre would not only be unduly restraining competition but would be threatening the very existence of these other theatres. An inquiry as to the run to be granted the proposed new theatre and as to the run to be granted its competitors, including appellant's Boulevard Drive-In Theatre and Surf Theatre, was necessary before there would be substantial evidence before the District Court on which the affirmative finding that the proposed new theatre would not unduly restrain competition could be made.

Suggested Terms for Granting Petitioner Leave to Acquire the Proposed Theatre

Appellant's counsel suggested to the District Court that the rights of all parties could be preserved by granting the petitioner leave to acquire the new theatre but on condition that the new theatre not exhibit pictures on any run earlier than that which until now has been afforded its competitors unless an earlier run were first approved by the District Court. This proposal would have enabled the petitioner to take its new theatre and compete on equal terms with the other theatres in the vicinity. It would not even have inhibited the new Loew Theatre from getting a better run provided it could first show to the District Judge that the said better run was granted as a result of legitimate business considerations and not because the operator of the new theatre was a wholly owned subsidiary of Loew's Theatre & Realty Corporation. Such an order would have prevented a repetition of what has occurred in Coral Gables where Loew has only one theatre.

Loew's Incorporated Would Be the Ultimate Beneficial Owner of the Proposed New Theatre for an Indefinite Period

After the *Paramount* case was remanded to the Statutory Court, the decree was redrafted to provide that the basic remedy for the abuses found to have existed in the motion picture industry was a complete divorcement and divestiture of distribution from exhibition. In so far as the Loew defendants were concerned, the mechanics of implementing this general decree (which was filed February 10, 1950) were contained in the consent (so-called) judgment entered against Loew's Incorporated on February 7, 1952. *Inter alia*, this judgment provided for (a) the formation of a new theatre company which would operate independently of Loew's Incorporated (which retained its production and

distribution business); and (b) a complete divestiture by Loew's Incorporated of its stock in the new theatre company within a three-year period from the entry of the decree, which period could be extended to five years.

Paragraph III 7 (b) of this judgment permitted applications by the new theatre company for leave to acquire new theatres to be made after the divorcement of the theatres had been accomplished even though divestiture of the stock had not yet been completed. It is important to note, however, that the judgment embodied a provision that the divestiture of stock had to be accomplished within five years from the date of judgment in any event. Therefore, it is reasonable to assume that the Statutory Court permitted applications for leave to take new theatres to be made by the new theatre company before divestiture of the theatre company's stock by Loew's Incorporated, since Loew's Incorporated would in any event have only a temporary interest in any such new theatre, which interest had to be cut off by a definite date—February 6, 1957.

On February 4, 1957 the District Judge entered an order which postponed the dates in the Consent Judgment against Loew's Incorporated for the "division or refinancing of stock distribution" of the new theatre company's interest from Lowe's Incorporated "until further order of this court."* The effect of this order is to enable Loew's Incorporated to keep its interest in exhibition through its ownership of the stock of Loew's Theatre & Realty Corporation until further order of the court at an indefinite future date.

At no time in these proceedings has the appellant sought to question the propriety of the entry of the order of February 4, 1957 and it most certainly is not seeking to reopen that subject here. However, appellant did urge the District

* This order is included in the Record on Appeal.

Judge to consider whether or not the indefinite postponement of the date of divestiture by Loew's Incorporated was not a matter to be given great weight in passing upon the instant petition of Miami Beach Theatre Corp. The order of February 4, 1957 permitted the *status quo* to remain undisturbed for reasons which were sufficient to the District Judge. However, it is quite a different thing to say that not only is the existing stake in theatre exhibition of Loew's Incorporated not to be disturbed until certain problems can be worked out, but in addition that Loew's Incorporated will be permitted to increase its interest in exhibition through additional acquisitions by Loew's Theatre & Realty Corporation. The latter case is entirely foreign to the spirit and letter of the previous opinions and judgments in *Paramount* which ordered a complete divorcement of exhibition interests from distribution interests.

In raising this point appellant was not merely arguing a theoretical point. During the argument below the District Judge was advised that during the period from February 16, 1956, when Loew's Riviera Theatre in Coral Gables opened, until April 18, 1957, the said Riviera Theatre played 33⅓ per cent of the pictures distributed by Loew's Incorporated on a first run, whereas the percentage of pictures of other companies played by the Riviera Theatre on a first run ranged from 4-76/100 per cent to 17-1/10 per cent. Certainly the District Judge should have received evidence as to whether or not this wide disrepancy in the case of pictures distributed by Loew's Incorporated playing at the Riviera Theatre as opposed to pictures distributed by other distributors was in some way related to the ownership by Loew's Incorporated of the exhibition company's stock. If an important distributor, such as Loew's Incorporated, were to unduly favor the proposed new Loew's theatre, this would be another means of unduly retraining competition in favor of a single theatre located in the midst

of many other theatres. That this method had been used successfully before to strangle competition is shown in the *Paramount* decrees and opinions and in the recent experience at Loew's Riviera Theatre in Coral Gables, yet the District Judge received no evidence, substantial or otherwise, on this point.

CONCLUSION

For the reasons stated in the Jurisdictional Statement and stated herein, the Supreme Court has jurisdiction over both of these appeals which present substantial meritorious and important questions requiring plenary arguments and further consideration by the Supreme Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 438

WOMETCO TELEVISION AND THEATRE COMPANY,

Appellant,

—against—

THE UNITED STATES OF AMERICA and MIAMI BEACH THEATRE CORP.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF

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October 2, 1957

PAGE

Statement 1

Argument 6

POINT I—The Order Denying Leave to Intervene Is Not Appealable and the Appeal Should Be Dismissed 8

A. Wometco was not entitled to intervene as of right 8

B. The Court did not breach its discretion in denying permissive intervention 10

POINT II—The Appeal from the Order Authorizing the Acquisition Should Be Dismissed 11

CASES CITED

Allen Co. v. *Cash Register Co.*, 322 U. S. 137 (1944) 8

Ball, Trustee v. *United States*, 338 U. S. 802 (1949) 6

Loew's Inc. v. *United States*, 339 U. S. 974 (1950) ... 1

Missouri-Kansas Pipeline Co. v. *United States*, 312 U. S. 502, 506 (1941) 8, 9

Partmar Corp. v. *United States*, 338 U. S. 804 (1949) 6

Railroad Trainmen v. *B. & O. R. Co.*, 331 U. S. 519, 524-5 (1947) 8

St. Louis Amusement Co. v. *United States*, 326 U. S. 680 (1945) 6

Sutphen Estates Inc. v. *United States*, 342 U. S. 19 (1951) 6, 8

United States v. *Paramount Pictures, Inc.*, 334 U. S. 131, 177 (1948) 1, 6, 9, 11

RULE CITED

Rule 24 of the Federal Rules of Civil Procedure ... 6, 8, 10

IN THE

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

Appellee Miami Beach Theatre Corp. respectfully moves this Court to dismiss the appeal or, in the alternative, to affirm the decision below.

BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

Statement

Subsequent to the decisions of this Court in *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131 (1948) and *Loew's Inc.* v. *United States*, 339 U. S. 974 (1950), Loew's Incorporated ("Loew's") and the United States, in February, 1952, entered into a consent judgment. That judgment required sale of designated theatres ("divestiture") and separation, into two different companies, of the

distribution and exhibition activities of Loew's ("divorcement"). It also contained various injunctive provisions.

The divorcement provisions (V) of the decree directed that the theatre assets of Loew's should be conveyed to a new company, referred to as the New Theatre Company, in return for the stock of the New Theatre Company. V(E) provided that so long as Loew's continued to own the stock of the New Theatre Company half of its directors should be appointed by the Court and subject to its direction. Paragraph V(C) reads as follows:

> "Within three years from the date of this judgment Loew's Incorporated shall distribute prorata to its stockholders the capital stock of the New Theatre Company; provided, however, if Loew's shall after two years from the date of this judgment show to the satisfaction of the Court, and the Court shall first find, that it is unable to arrange a division of its present funded debt between it and the New Theatre Company or to procure substantially similar financing in replacement of the present funded debt so as to accomplish a division of such debt in a manner which will permit such companies to do business with a reasonably prudent financial position, Loew's Incorporated may retain the stock of the New Theatre Company until a division or refinancing to accomplish a division of its present funded debt in a reasonably prudent manner between Loew's Incorporated and the New Theatre Company can be arranged, but such division or refinancing shall in any event be made no later than five years from the date of this judgment; and Loew's Incorporated shall distribute the stock of the New Theatre Company prorata among its stockholders within thirty (30) days after a division or refinancing of its present funded debt is effectuated."

The time to arrange a division of the debt has been extended by order of Judge Palmieri dated February 6, 1957.*

A footnote to III(7) of the consent judgment provided that divorcement shall not be deemed incomplete by virtue of retention of the New Theatre Company stock by Loew's pending efforts to arrange a division of the debt.

III(7) of the decree prohibited (except in certain circumstances not here material) acquisitions of theatres by

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*Judge Palmieri had occasion to comment upon the circumstances which impelled a further extension of the deadline during the hearing on the orders involved on this appeal:

"MR. STEIN: . . .

"But, in addition to that provision, there was also a provision that Loew's, Inc., within five years, would get rid of any beneficial interest it had in the Theatre Corporation.

"As of this day, more than five years later, it has not gotten rid of that interest and, furthermore, by an order entered by your Honor on February 4, 1957, that provision had been waived until further order of the court.

"Now, what does that mean?

"THE COURT: That means that we have got a problem that can't be solved yet. There is a mere matter of about $35 million of a funded indebtedness due to about eight insurance companies, and, if you had the wisdom of Solomon, you couldn't have solved it so far.

"MR. STEIN: I am not attempting to, sir.

"THE COURT: It is a very vexatious, difficult and troublesome matter which I have had to impose upon a number of people to come in and help me as consultants and which we have not yet found a solution to, but we will as rapidly as it is possible to do so.

"When you talk about waiver, don't do so quite so flippantly because nothing has been waived. These people have been held to toe the line very closely, but unfortunately it hasn't been easy to solve but it will be solved as soon as it can be.

"If you know anybody that would like to lend $35 million for 3 per cent interest I would like to know about it, because then we can solve it."

(Transcript of hearing June 27, 1957, pp. 15-17.)

Appellant has stated in its jurisdictional statement that:

". . . Appellant is not seeking to question the order which so extended the time of Loew's Incorporated for divestiture. . . ." (Juris. St., p. 17)

Loew's prior to accomplishment of divorcement and divestiture, and authorized their acquisition after the accomplishment of divorcement and divestiture only in those cases where "the New Theatre Company shall show to the satisfaction of the Court, and the Court shall first find, that the acquisition will not unduly restrain competition."

X(1) of the decree provided as follows:

> "1. Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this consent judgment and no others to apply to the Court at any time for such orders or direction as may be necessary or appropriate for the construction, modification, or carrying out of the same and for the enforcement of compliance therewith and for the punishment of violations thereof, or for other or further relief."

On September 1, 1954, divorcement as defined for purposes of III(7) of the consent judgment was carried out; as of that date everything was accomplished except division of the debt and final distribution of the stock. As of that date the New Theatre Company became empowered, with permission of the Court, to acquire new theatres.

In June of 1957 Miami Beach Theatre Corp., a Loew's theatre-owning subsidiary, which will, when division of the debt is accomplished, become a subsidiary of the New Theatre Company, moved for an order authorizing it to acquire and operate a theatre to be constructed about 10 miles north of Miami Beach, Florida. The moving papers show—without contradiction—that the New Theatre Company and its affiliates presently are interested in only two theatres in Florida, one in South Miami, 24 miles away, and the other in Jacksonville, 400 miles away. Those moving papers also generally describe the nine theatres that are physically closest to the site of the proposed acquisition, and the eight first-run theatres in downtown Miami. Information concerning theatres in the area is shown graphically by

two maps that were submitted by Miami Beach Theatre Corp.

The United States did not oppose the application. Its counsel appeared on the return of the motion and advised the Court that "it is the view of the Government that the acquisition of this theatre by Loew's Theatres will not unduly restrain competition". (Pages 11-12 transcript of hearing of June 27 and 28.)

Wometco Television and Theatre Company ("Wometco"), a circuit which owns twenty-three motion picture theatres in the Miami area, sought leave to intervene and oppose the motion. The position taken by Wometco in the proceedings below may be summarized as follows:

1. If the acquisition is approved, Wometco will be injured because it has a theatre nearby the proposed site of the new theatre.

2. The Government will not adequately represent the interest of Wometco (see Wolfson affidavit, pages 1-2). Analysis of prior applications by the New Theatre Company shows that the Government has not conscientiously investigated the problems presented by the acquisitions for which approval was sought, and that it has neither the ability nor the desire to protect the interests of competing exhibitors.

3. If the application is granted, Loew's will unlawfully favor the new theatre, and discriminate against Wometco; this is apparent from the fact that another theatre in the Miami area, acquired with permission of the Court in 1955 (over Wometco's opposition), has been given preferential treatment by Loew's.*

*The answering affidavit denies this. It asserts that the other Miami theatre—the Riviera—"has been required to bid competitively for product and has at no time been shown any favoritism whatsoever by any distributor, while Wometco has been favored because of its dominant position and buying power in the area. Wometco has on numerous occasions obtained product without bidding competitively, all to the detriment of the Riviera Theatre."

4. Wometco will be unable, once permission to make the acquisition is granted, to secure an injunction to protect itself against such violations of law.

Judge Palmieri denied Wometco's motion to intervene, but did accord to it the right to be heard as amicus curiae. The order so holding was filed on July 1, 1957. A hearing was held at which counsel for Wometco was heard in opposition to the motion of Miami Beach Theatre Corp. On July 10 that motion was granted and leave was given to acquire the theatre; that order was filed on July 11. On July 24 Wometco served a notice of appeal from both orders.

Argument

This is the sixth time that this Court has had occasion to pass upon a decision of the District Court denying the application of a private party to intervene in the Government antitrust suit against the motion picture companies. In the five prior instances this Court sustained the action below either by dismissing the would be intervenor's appeal or by affirming the decision below. *St. Louis Amusement Co.* v. *United States*, 326 U. S. 680 (1945); *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 177 (1948); *Ball, Trustee* v. *United States*, 338 U. S. 802 (1949); *Partmar Corp.* v. *United States*, 338 U. S. 804 (1949); *Sutphen Estates Inc.* v. *United States*, 342 U. S. 19 (1951). Nothing involved in this appeal warrants any different treatment from that accorded the five prior ones.

Intervention is regulated by Rule 24 of the Federal Rules of Civil Procedure, which reads as follows:

RULE 24.

INTERVENTION.

(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an

action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or of an officer thereof.

(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) *Procedure.* A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney Gen-

eral of the United States as provided in Title 28, U. S. C. § 2403.

POINT I

THE ORDER DENYING LEAVE TO INTERVENE IS NOT APPEALABLE AND THE APPEAL SHOULD BE DISMISSED.

It is well settled by a series of cases that a decision denying leave to intervene is appealable in two cases only: (a) where intervention as of right is granted under the Federal Rules; and (b) where (i) the Federal Rules provide for permissive intervention and (ii) the Court below committed a breach of discretion in denying permission to intervene.* Neither circumstance is present here.

A. Wometco was not entitled to intervene as of right.

Wometco relied upon (2) and (3) of Rule 24(a) as affording it a right to intervene. (3) is plainly inapplicable: no property *in custodia legis* is here involved. (2) is equally inapplicable because Wometco will not be bound by the decision on the instant application; and Wometco has no interests to be protected in connection with that application.

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*"Our jurisdiction to consider an appeal from an order denying intervention thus depends upon the nature of the applicant's right to intervene. If the right is absolute, the order is appealable and we may judge it on its merits. But if the matter is one within the discretion of the trial court and if there is no abuse of discretion, the order is not appealable and we lack power to review it. In other words, our jurisdiction is identified by the necessary incidents of the right to intervene in each particular instance. . . ." *Railroad Trainmen* v. *B & O. R. Co.*, 331 U. S. 519, 524-5 (1947). See also *Allen Co.* v. *Cash Register Co.*, 322 U. S. 137 (1944); *Sutphen Estates* v. *United States*, 342 U. S. 19 (1951); *cf. Missouri-Kansas Pipeline Co.* v. *United States*, 312 U. S. 502, 506 (1941) ("Plainly enough, the circumstances under which interested outsiders should be allowed to become participants in a litigation is, barring very special circumstances, a matter for the nisi prius court.")

Implicit throughout Wometco's position is the assumption that the purpose of the *Paramount* case and the decrees against the defendants in that case was to protect the private interests of Wometco. But the decree itself contradicts that assumption. The very clause pursuant to which permission was sought below requires a showing that the acquisition will not unduly restrain *competition*; it does not require a showing that there shall be no harmful effect upon *competitors*. It was the public, not a private, interest that the decree sought to protect. Witness Section X, which authorizes the parties to the consent judgment *and no others* to make application to the Court for appropriate relief.

The situation here presented contrasts with that involved in *Missouri-Kansas Pipeline Co.* v. *U. S.*, 312 U. S. 502 (1941), in which a consent decree contained a specific provision designed to protect a private party.* This Court's decision in that case is based upon the proposition that "where the enforcement of a public law also demands distinct safeguarding of private interests *by giving them a formal status in the decree*, the power to enforce rights thus sanctioned is not left to the public authorities nor put in the keeping of the Court's discretion." (Page 506; emphasis added.)

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*The *Pipeline* case arose out of an antitrust suit against Columbia Gas in which it was asserted that Columbia had acquired financial control of the Panhandle Company in order to prevent the latter from competing in Columbia's territory. The case was settled by a consent decree which contained provisions preventing interference with Panhandle and granting to Panhandle the right to intervene in the action and secure injunctive relief in the event that its operations were hindered. Later the Department sought an amendment of the decree. Panhandle sought to intervene in the proceedings. Its application was denied. It thereupon appealed to the Supreme Court. The Supreme Court reversed for the reason indicated in the text.

B. The Court did not breach its discretion in denying permissive intervention.

1. Wometco's failure to follow the procedure directed by Rule 24(c) would suffice to justify, if not to compel, the decision below. The Rule requires that the motion "shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought". The Jurisdictional Statement speaks of a "contemplated lawsuit" (p. 6); but Wometco nowhere, either here or in the Court below, sets forth the nature of the claim that would be presented in that suit. That failure to follow the required procedure made it impossible for the Court to find that Wometco's claim and the acquisition application involved common questions. As will be shown in the next paragraph, the required proposed pleading, had it been prepared, would have demonstrated the absence of a common question.

2. The Court below was not authorized to permit intervention under Rule 24(b) because Wometco actually has no "claim or defense" that involves the questions presented in the Miami Beach Theatre Corp. application. While Wometco, despite the requirements of the Rule, omitted to submit a pleading setting forth the nature of its "contemplated lawsuit", it is apparent from the moving papers that Wometco's claim would necessarily involve a question considerably different from that presented upon the application below. The issue involved in the "contemplated action" would be, not whether the acquisition was one which should be excepted from the prohibitions of the decree—Wometco has no protectible private rights under the decree—but the considerably different issue as to whether the acquisition would run afoul of the far lesser strictures imposed by the antitrust laws.

3. But if the Court had the power, in the exercise of its discretion, to authorize intervention here, its denial of intervention involves no breach of discretion. The circumstances favoring Wometco's intervention are no stronger than those urged by would-be interveners in the five prior instances in the motion picture litigation in which denial of intervention was approved by this Court, or the other prior instances where intervention was denied and no appeal taken.*

POINT II

THE APPEAL FROM THE ORDER AUTHORIZING THE ACQUISITION SHOULD BE DISMISSED.

Dismissal of the appeal from the order denying intervention operates to confirm Wometco's lack of standing to take an appeal from the order sanctioning acquisition of a new theatre. The appeal from that order should therefore be dismissed as well.

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*According to the opinion of Judge Sugarman on a prior similar motion in this action, 136 F. Supp. 13[illegible]4 (1955), there had been, as of December 19, 1955, nine prior unsuccessful attempts to intervene in the *Paramount* case. There have been two additional unsuccessful intervention attempts (not including Wometco's attempt) since the date of Judge Palmieri's decision.

Of interest are the following comments of Judge Sugarman during the hearing on December 19, 1955, pp. 75-6:

> "THE COURT: In other words, you could come in now and say in every single case, where any theatre exhibiting corporation, that was splintered off as a result of the Paramount decree, came in and asked for permission to obtain an interest or an entire theatre, then I take it that the competing theatres, and I have no illusions about it, they are worrying about their own pocketbooks, they aren't worrying about the public——
>
> "MR. STEIN: No question about it.
>
> "THE COURT: But they would all come running in and want the Court to determine in anticipation what run this newly-acquired interest is to get, and I don't think that is the province of the Court. I don't think it was the intention of the Paramount decree to put the Court into the business of operating theatres and that, in essence, is what we are doing."

If this Court were to pass upon the decision below authorizing the acquisition, it is clear that its decision would necessarily be an affirmance.

As Wometco itself apparently recognizes by citing the cases on the bottom half of page 3 of the Jurisdictional Statement, the only question is whether there was substantial evidence to support the decision below. Substantial evidence there was.

Indeed, the evidence presented shows that competition would benefit, rather than lose, by the granting of the application. The record shows that the New Theatre Company has a negligible position in the exhibition field in Florida, and that the Miami area is dominated by two large theatre circuits, one of whom is Wometco.

The essence of Wometco's opposition is that Loew's will conspire with the new theatre, in violation of the decree, to prefer it over its competitors. As Judge Palmieri pointed out on the hearing (p. 24), were Loew's to do so it would be in contempt of the provisions of the decree.* The Jurisdictional Statement's expressed fear of the use of the "long purse" by the new theatre is incongruous when uttered by the dominant circuit in the Miami area. It should be recalled that the "long purse" of the new theatre will be controlled by a board of directors, half of whose members are appointed by the Court. The Court below would have been justified in suspecting that Wometco's sole concern about "long purses" was the fear its own might be shortened.

All the important aspects of the problem presented on Miami Beach Theatre Corp.'s application were effectively decided by express provisions of the decree itself. Thus,

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*II(8) of the decree restrains Loew's "From licensing any feature for exhibition upon any run in any theatre in any other manner than that each license shall be offered and taken theatre by theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres or others."

the decree itself establishes that the New Theatre Company is not to be generally prohibited from engaging in exhibition or from acquiring new theatres.* And the decree itself provides that the retention of the New Theatre Company stock by Loew's pending division of the debt should not operate to prevent approval of new acquisitions. It is true that the original decree contemplated that retention of the stock should not last longer than two years—until February of this year. However, the Court has, for good and sufficient reason, extended the two-year period, and Wometco asserts that it does not question that extension (Juris. St., p. 17). If there was ever a situation in which acquisition of an additional theatre by Loew's was to be approved—and clearly the decree contemplated that such acquisitions should be approved at least in some circumstances—this is such a situation.

Respectfully submitted,

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Of Counsel

October 2, 1957

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*It might be inquired in what manner the operation of the new theatre in Miami will affect competition more adversely than the operation by the New Theatre Company of any of the other theatres which the decree allowed it to retain.

JOHN T. FEY, Clerk

No. 438

In the Supreme Court of the United States

OCTOBER TERM, 1957

WOMETCO TELEVISION AND THEATRE COMPANY,
APPELLANT

v.

UNITED STATES OF AMERICA AND MIAMI BEACH THEATRE CORP.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF THE UNITED STATES TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM

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INDEX

	Page
Statement	2
Argument	5
Conclusion	10
Cases:	
Allen Calculators, Inc. v. *National Cash Register Co.*, 322 U. S. 137	1, 5, 7, 8, 9
Ball v. *United States*, 338 U. S. 802	9
Loew's, Inc. v. *United States*, 339 U. S. 974	2
Missouri-Kansas Pipe Line Co. v. *United States*, 312 U. S. 502	6
Partmar Corp. v. *United States*, 338 U. S. 804	9
St. Louis Amusement Co. v. *United States*, 326 U. S. 680	9
Sulphen Estates, Inc. v. *United States*, 342 U. S. 19	1, 7, 8, 9
United States v. *American Society of Composers, Authors and Publishers*, 11 F. R. D. 511	9
United States v. *Bendix Home Appliances*, 10 F. R. D. 73	9
United States v. *California Canneries*, 279 U. S. 553	8
United States v. *General Electric Co.*, 95 F. Supp. 165	9
United States v. *Loew's Inc.*, 136 F. Supp. 13	9
United States v. *Paramount Pictures*, 334 U. S. 131	2, 4, 9
Miscellaneous:	
Federal Rules of Civil Procedure:	
Rule 24 (a)	5, 6
Rule 24 (b)	6, 7
Revised Rules of the Supreme Court of the United States, Rule 16, 1 (a) and 1 (c)	1

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MOTION OF THE UNITED STATES TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM

Pursuant to Rule 16, paragraphs 1 (a) and 1 (c), of the Revised Rules of this Court, the appellee United States of America moves to dismiss the appeal upon the ground that the orders which have been appealed are not appealable by appellant (*Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137; *Sutphen Estates, Inc.* v. *United States*, 342 U. S. 19), and moves, in the alternative, to affirm the appealed orders upon the ground that the questions upon which the decision of the cause depends are so unsubstantial as not to require further argument.

The orders which have been appealed were entered in a proceeding pursuant to provisions of the consent judgment entered against Loew's Incorporated (Loew's) on February 7, 1952. That judgment terminated as to this defendant the Government's Sherman Act proceeding against the country's principal motion picture exhibitors and distributors, which proceeding has twice been before this Court (*United States* v. *Paramount Pictures,* 334 U. S. 131; *Loew's Inc.* v. *United States,* 339 U. S. 974).

Under Section X of the judgment, jurisdiction of the cause was retained for the purpose of enabling "any of the parties to this consent judgment and no others" to apply to the court at any time for such orders as may be necessary or appropriate for the construction, modification or carrying out of the judgment provisions.

Appellee Miami Beach Theatre Corp., a wholly-owned subsidiary of Loew's Theatre & Realty Corporation, applied to the district court for permission to acquire and operate a theatre to be erected in Dade County, Florida, at a place about ten miles north of downtown Miami Beach and seven miles south of downtown Hollywood, Florida, in an area occupied by many motels. The application was made pursuant to Section III, 7, (b) of the judgment, which provides that after the divorcement and divestiture provisions of the judgment have been carried out, the New Theatre Company to be created pursuant to the judgment's divorcement provisions may not acquire a new theatre interest unless the New Theatre Company

shows to the satisfaction of the court, and the court shall find, that "the acquisition will not unduly restrain competition."

Loew's Theatre & Realty Corporation is the New Theatre Company created to carry out the divorcement provisions of Section V of the judgment. This section provides that, in order to effect a divorcement of Loew's theatre interests from its other assets, it shall consummate a plan of reorganization providing for transfer of all its theatre interests to the New Theatre Company in exchange for the latter's stock, and that, subject to certain contingencies, Loew's shall distribute this stock pro rata to its stockholders. The section further provides that, until Loew's distributes the stock of the New Theatre Company to its stockholders, Loew's and the New Theatre Company shall be "operated wholly independently of each other," and that one-half of the latter's board of directors shall be approved by the court and "subject to its direction."

Under III, 3, (b), of the judgment, Miami Beach Theatre Corp. is entitled to an order by the court approving acquisition of a new theatre upon a showing and court finding that the acquisition will not unduly restrain competition. The fact that Loew's has not, to date, distributed to its stockholders the stock of the New Theatre Company is immaterial.[1]

---

[1] The reason for the nondistribution is the difficulty in refinancing Loew's funded debt (amounting to $40,000,000 at the time of the judgment) so as to bring about a division of debt between Loew's and the New Theatre Company giving for each "a reasonably prudent financial position." See Sec. V, par. C, of the judgment.

The provisions for such distribution are contained in paragraph C of Section V of the judgment, and a note attached to paragraph 7 (a) of Section III states: "For the purpose of this paragraph 7, divorcement shall not be deemed incomplete by reason of any action or conduct under or pursuant to paragraphs C and D of Section V, or either of them."

Appellant moved for leave to intervene in opposition to the petition filed by Miami Beach Theatre Corp. The district court by its order of July 1, 1957 denied this motion, but granted appellant leave "to be heard as an amicus curiae." The court, after having heard argument by appellant's counsel, by counsel for appellee Miami Beach Theatre Corp., and by counsel for the Government, entered a further order on July 10, 1957, in which order the court, after finding that the proposed acquisition will not unduly restrain competition, authorized Miami Beach Theatre Corp. to acquire the theatre to be erected in the Sunny Isles Area of Dade County, Florida. The foregoing orders are those which have been appealed.

At the hearing, counsel for the Government categorically denied that the Government ignored complaints by exhibitors relating to matters arising under judgments entered in the *Paramount* case, and he stated that the Government evaluates every such complaint and does something about those which are meritorious (Tr. 48). He further stated that Loew's Theatre & Realty Corporation had only one theatre in the entire Miami, Miami Beach, Hollywood and Ft. Lauderdale resort area, the Riviera Theatre, which is approximately 24 miles from the proposed new thea-

tre (Tr. 8); that if the new theatre obtains first-run pictures, it will be one of a substantial number of others playing first-run in the Miami Beach area, and that if it operates subsequent-run, there will be approximately eight subsequent-run theatres within an eight mile area (Tr. 11); that the Government opposed any court restriction on first-run showings by the new theatre because this would protect first-run theatres in downtown Miami Beach, where appellant has first-run theatres, against additional first-run competition (Tr. 53); that persons in the area in which the new theatre is to operate now have to go about ten miles to see first-run showings (Tr. 53); and that the question of whether or not the new theatre would be able to obtain first-run pictures should be determined by "competitive forces" (Tr. 54).

ARGUMENT

Appellant contends (J. St. 3–6) that it is entitled to intervene as of right under clauses (2) and (3) of Rule 24 (a) of the Federal Rules of Civil Procedure.[2] In *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137, the decree which had been entered in a Sherman Act proceeding by the Government prohibited the defendant National Cash Register

[2] Rule 24 (a) provides that upon timely application anyone shall be permitted to intervene in an action "(2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof."

from acquiring control of any company which makes or sells cash registers unless the court, on defendant's petition, should determine that the acquisition will not substantially lessen competition. On the filing of such a petition, Allen Calculators applied for leave to intervene in opposition to the petition. The district court entered an order denying intervention and, after a hearing, entered a further order authorizing the proposed acquisition subject to certain conditions, and Allen Calculators appealed to this Court alleging error in the denial of intervention.

Thus the basic facts and issues in *Allen Calculators* precisely parallel those here. This Court, in holding that the appellant could not intervene as of right under either clause (2) or clause (3) of Rule 24 (a), said that the intervention application did not fall under clause (2) because "the appellant clearly would not be bound by any judgment in the action", and that it did not come under clause (3) because appellant did not have "any interest in the distribution or disposition of property in the custody of the court." 322 U. S. at 141. The Court also said that since the decree which gave rise to the intervention application did not give the appellant the right to intervene, *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502, was not applicable (*ibid.*).

The present appellant also contends (J. St. 6), as did the appellant in *Allen Calculators*, that the district court abused its discretion in denying permissive intervention under clause (2) of Rule 24 (b), which authorizes permissive intervention "when an applicant's claim or defense and the main action have a

question of law or fact in common". Rule 24 (b) also provides: "In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

On the question of whether appellant's claim and the main action have "a question of law or fact in common", appellant's only showing was (1) that Miami Beach Theatre Corp.'s petition presented the issue of whether the proposed theatre acquisition will unduly restrain competition, and (2) "Under the Sherman Act, Clayton Act and general equitable principles, Wometco [the present appellant] would have a right to enjoin petitioner [Miami Beach Theatre Corp.] from acquiring this theatre if it appeared that such acquisition would unreasonably restrain competition" (Wolfson affidavit, p. 5). We submit that appellant, by this vague characterization of the nature of its claim, "has not maintained the burden of showing" that its intervention application comes within Rule 24 (b) (2). See *Sutphen Estates, Inc.* v. *United States*, 342 U. S. 19, 22.

But irrespective of whether appellant has sustained the burden of establishing the applicability of Rule 24 (b) (2), it is manifest that the district court did not abuse its discretion in denying intervention, in order to avoid undue delay or prejudice in adjudication of the rights of the original parties. In *Allen Calculators*, which held that denial of permissive intervention upon this ground was not an abuse of discretion, the Court said that "exercise of discretion in a matter of this sort is not reviewable by an appel-

late court unless clear abuse is shown * * *". 322 U. S. at 142. It further said (*ibid.*):

> It was, *inter alia,* to prevent the delay of unwarranted appeals by disappointed applicants to intervene, which would suspend the ultimate disposition of suits under the antitrust acts, that jurisdiction to review District Court decrees was not vested in the Circuit Courts of Appeals but solely in this court, and that the statute limited the right of appeal to final decrees.[3]

In *Sutphen Estates* the Court, in holding that there had been no abuse of discretion in denying leave to intervene under Rule 24 (b), said that the district court "had ample reason to prevent the administration of the decree from being burdened with a collateral issue that on this record can properly be adjudicated elsewhere." 342 U. S. at 23.

The contentions which appellant wishes to press in the role of intervenor illustrate the delay and prejudice to the rights of the parties to the main action likely to result should intervention be allowed. Appellant seeks to raise, among other questions, the validity of the provisions of the judgment which permit the court to approve new theatre acquisitions prior to distribution of the stock of the New Theatre Company to Loew's stockholders (J. St. 17–18), and numerous issues relating to the prior court approval of the New Theatre Company's acquisition of the Riviera Theatre (J. St. 13–14; Tr. 20–26).

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[3] A footnote cites *United States* v. *California Canneries*, 279 U. S. 553.

In the prolonged *Paramount* proceedings this is at least the eleventh time in which intervention has been denied. In *United States* v. *Loew's, Inc.*, 136 F. Supp. 13, 14 (S. D. N. Y.), the court, in denying intervention under circumstances precisely like those here, stated that an examination of the records in the *Paramount* case showed that at least nine previous attempts to intervene in that proceeding had met with failure. Furthermore, when such rulings were appealed, this Court had upheld denial of intervention.[4]

In other Sherman Act proceedings brought by the United States, district courts have uniformly refused to permit private parties to intervene in the absence of consent by the United States or a judgment provision authorizing intervention.[5] In the *Bendix* case cited in footnote 5, the district court said (10 F. R. D. at 76–77):

> But certainly where, as in the case at bar, the United States has taken no action under the decree against the defendant; where, indeed, the United States has sifted the proposed intervenors' complaints and has decided to oppose the intervention, it would violate the statutory policy to allow the petition. Intervention would tend to make the private parties quasi

[4] *St. Louis Amusement Co.* v. *United States*, 326 U. S. 680 (motions to dismiss granted); *Ball* v. *United States*, 338 U. S. 802 and *Partmar Corp.* v. *United States*, 338 U. S. 804 (motions to affirm granted); *Sutphen Estates, Inc.* v. *United States*, 342 U. S. 19 (appeal dismissed).

[5] *United States* v. *Bendix Home Appliances*, 10 F. R. D. 73 (S. D. N. Y.); *United States* v. *American Society of Composers, Authors and Publishers*, 11 F. R. D. 511 (S. D. N. Y.); *United States* v. *General Electric Co.*, 95 F. Supp. 165 (D. N. J.); *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137.

attorneys general in enforcing the anti-trust laws, in contravention of 15 U. S. C. A. § 4 and 15 U. S. C. A. § 25 which explicitly require that Government suits shall be under the direction of the Attorney General.

CONCLUSION

The decision below is correct, and this appeal presents no substantial question. It is therefore respectfully submitted that the appeal should be dismissed or the judgment of the district court should be affirmed.

J. LEE RANKIN,
Solicitor General.
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